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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 689

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,
Appellants,

vs.

ANDREW J. DuPRE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION

AARON KRAVITCH,
PHYLLIS KRAVITCH,
JOSEPH FROMBERG,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 2362

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,

vs.

ANDREW J. DuPRE, ET AL.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiffs-appellants, having presented this day their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States had jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from the final order, judgment or decree which dismisses the suit by plaintiffs-appellants

and denies the application for an interlocutory injunction therein to restrain individuals composing the South Carolina State Board of Fisheries from enforcing against plaintiffs-appellants certain South Carolina Statutes which provide that the State of South Carolina has the right within the three mile maritime belt to seize, confiscate, condemn and sell any fish, shrimp, tackle or equipment seized off the shores of South Carolina for violation of any of the Shrimp or fishing laws of said State as set out in Statutes 3493, 3379 as amended and 3408, which provides for summary confiscation and condemnation of said vessels without trial or hearing thereon, and Section 3328 of the Code of Carolina which permits the boarding of vessels without a search warrant and the arrest thereon of persons claimed to be violating the fishing laws of South Carolina without a warrant of arrest, and in permitting rules of evidence to be adopted as set out in Section 3379 as amended, and in enforcing statutes which are not conservation measures at all but designed to harass and interfere with the legitimate rights of plaintiffs-appellants to market their wares.

The final order, judgment or decree here appealed from was entered in the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on January 30, 1950 by a statutory court consisting of one Circuit and two District Judges specially convoked under and by virtue of the provisions of Section 266 of the Judicial Code as revised under Title 28, USCA, Chap. 155, Sec. 2281 and this appeal is filed under the 28 USCA, Chapter 81, Section 1253, concluding as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be

heard and determined by a District Court of three Judges".

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express provisions last above set forth.

Paramount Pictures v. *Langer*, 306 U. S. 619, 83 L. Ed. 1025, 59 S. Ct. 641.

The three judge Court did not question the jurisdiction of the Federal Court, there being an amount of over Three Thousand ($3,000.00) Dollars involved and the constitutionality of State Statutes being questioned.

Under title 28, USCA, Chapter 151, Sec. 2201 the three Judge Court had the right to render a declaratory judgment.

(B) The State Statutes and Administrative Orders Which Are Involved

The plaintiffs' complaint contends that certain statutes of the State of South Carolina are void and unconstitutional as applied to them upon the following grounds:

1. That the State of South Carolina has no jurisdiction to enact the statutes in question governing the coastal waters or ocean within the three-mile maritime belt lying seaward of the ordinary low water mark on the coast thereof.

2. That said statutes as applied to plaintiffs are in violation of the Equal Protection clause and the Due Process clause of the Fourteenth Amendment and are unreasonable and confiscatory.

3. That said statutes are not bona fide conservation measures, but were passed and operate to illegally deny to the plaintiffs rights granted under the Constitution of the

United States as aforesaid and designed to perpetuate and create a monopoly in the shrimp industry.

The Statutes of the State of South Carolina above referred to provide in substance as follows:

Section 3310 of the Code of South Carolina authorizes the Board of Fisheries to enforce the fishing laws and a penalty not to exceed forfeiture of license and privilege, whereas, *Section 3408* as amended gives to said Board the right to summarily seize and forfeit all boats, rigging and equipment used in any violation of the fishing laws and likewise *Sections 3403* and *3379 as amended.*

Sections 3379 as amended, 3403 and 3408 provide for the summary seizure of all boats, equipment and rigging used in violation of the fishing laws of the State of South Carolina and retention of the proceeds thereof.

Section 3408 as amended provides for a closed season on shrimp or prawn beginning the 1st day of January and ending the 1st day of May of each calendar year.

Section 3379 as amended provides that if any licensed trawler is found violating any fishing laws it shall be presumed that the registered Master was upon said boat and said presumption shall be *prima facie* evidence of his presence on said boat and operating same at time of the violation charged.

Section 3328 gives authority to inspectors without either a search warrant or arrest warrant to enter any premises, vessels, boat houses, sheds, etc., used in connection with fishing and to arrest thereon persons found violating penal laws.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and appears of record on January 30, 1950. The petition for appeal herein was presented and filed on February 9, 1950.

(D) Statement Showing That the Nature of the Case and of the Ruling of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

The complaint attacked the validity and constitutionality of the foregoing Statutes of the State of South Carolina regulating shrimping in the ocean waters within the three miles maritime belt from the low water mark on the coast of the State of South Carolina.

The petition for an interlocutory injunction and declaratory judgment was presented to Hon. J. Waties Waring, U. S. District Judge, who set the hearing on the prayer for an interlocutory injunction for a date certain and called one Circuit Judge and one District Judge to his assistance as required by the Judicial Code, Title 28, USCA, Chap. 151, Sec. 2281 and 2284.

On the 19th day of December, 1949 by agreement, a final hearing was held on the application for interlocutory injunction and declaratory judgment and thereafter on January 30, 1950 the same three Judges entered a final judgment and decree dismissing plaintiff's complaint and denying the application for interlocutory injunction and for declaratory judgment.

The case was heard and determined and the final judgment and decree was predicated upon the issues raised by the

plaintiffs' complaint and the defendants' return and answer and were in substance as follows:

(1) Whether a Federal Court of Equity had jurisdiction to entertain the application for injunction.

(2) Whether the plaintiffs were entitled to relief in equity because of having violated an equitable maxim of not coming into court with clean hands.

(3) Whether the statutes attacked were unconstitutional and,

(4) Whether the plaintiffs were entitled to the relief which they sought or whether the proceedings should be remanded to a State Court.

(5) Whether plaintiffs are entitled to a declaratory judgment.

The Court in its decree held that the plaintiffs had a right to come into a Federal Court of Equity, that they had not violated any equitable maxim, and that the case did not have to be remanded back to the State Courts; however, on the general broad basic proposition the Court held that the statutes were not unconstitutional and the plaintiffs, because of said fact, were not entitled to the relief sought.

The sole issue, therefore, for determination by the Supreme Court is the constitutionality of the Statutes of the State of South Carolina as enumerated in the pleadings.

(E) **The Issues Involved Are of National Importance**

In that they affect the rights of fishing interests in many of the coastal states in that they would be applied against resident as well as non-resident fishermen, and it is necessary that said situation be clarified. The fishing interests now have reached such proportions that laws affecting this industry concern thousands of persons and huge investments running into millions of dollars.

(F) Court Abused Its Discretion in Denying the Interlocutory Injunction

In accordance with order promulgated by the Supreme Court of the United States, April 6, 1942, amending Paragraph 1, Rule 12 of said Court, plaintiffs-appellants show that the error by the Court committed in denying the interlocutory injunction which constituted an abuse of its discretion was because,

(a) Said Court had the right to entertain the petition for and to grant the declaratory judgment prayed.

See: U.S.C.A. Title 28, Chap. 151, Sec. 2201-02;
Berlitz School v. *Donnelly & Suess*, 84 F. Supp. 75 (1949);
Lord v. *Garland*, 168 P. (2) 5;
Haughton v. *Lankford*, 52 SE. (2) 111.

While a discretion is vested in the Court it is a Judicial discretion which must find its basis in good reason and is subject to appellate review in proper cases.

See: *American Gas Co.* v. *Howard*, 173 F. (2) 924.

Under the evidence in this case it is contended that the evidence demanded a finding in favor of plaintiffs-appellants.

(b) Because Statutes 3403, 3379 as amended and 3408 violate the Fourteenth Amendment of the Constitution, Due Process Clause and Equal Protection Clause in that they provide for the summary seizure and confiscation of articles of value running into thousands of dollars without affording to the plaintiffs-appellants either their procedural or substantive day in court.

U. S. Constitution, Article XIV;
Frahn v. *Greyling Realization Co.*, 195 So. 758;
Swanson v. *Bates*, 170 F. (2) 648 (1949);
Palko v. *State of Connecticut*, 58 S. Ct. 141, 302 U. S. 319, 82 L. Ed. 288 (1937).

Said penalties, even if permitted, were excessive and amounted to a deprivation of property without due process of law.

See: *Waters-Pierce Oil Co.* v. *State of Texas*, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

(c) Section 3379 relating to presumption is unconstitutional.

McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79, 60 L. Ed. 899.

(d) Section 3328 which permits entry without search warrant or warrant to arrest is illegal.

See: *Gilbert* v. *U. S.*, 163 F. (2) 325;
Johnson v. *U. S.*, 68 S. Ct. Rep. 367.

(e) State cannot proceed to confiscate without a judicial proceeding in violation of Judiciary Act of 1789, Sec. 9.

See: *Hendry* v. *Moore*, 318 U. S. 132, 87 L. Ed. 663 (1942).

In that case the Court upheld the seizure provisions of the statute only because it provided for a judicial proceeding.

(f) The evidence showed that the Court had jurisdiction, that the acts by the defendants were oppressive and in violation of the Constitutional rights of the plaintiffs-appellants, and defendants admitted in open Court their intention to continue to act under the Statutes under attack seeking to justify their summary action by the specious claim that Section 846 of the Code of South Carolina (1942) afforded appellants ample remedy.

For the above reasons plaintiffs-appellants contend that the Court abused its discretion in denying the interlocutory injunction.

(G) The Amount Involved Is Substantial

In that the property losses in the present case according to the record amount to more than One Hundred Thousand ($100,000.00) Dollars a year as applied only to petitioners, a mere segment of the fishing interests of one state.

(H) Substantial Federal Questions Are Raised

This is not the first time the State of South Carolina has been hailed into the Federal Courts to prevent violation of constitutional provisions as applied to fish and shrimp regulations.

See: *Toomer* v. *Witsell*, 334 U. S. 385.

There has been no clear cut decision of the Supreme Court on the Question of the right to seize fishing vessels of values ranging from five to fifteen thousand dollars for minor violations of fishing laws and for failure to pay nominal license fees. The majority opinion in *Hendry* v. *Moore*, *supra* did not decide this question as that case dealt with the seizure of a fish net of small value under a California Statute which provided for a judicial hearing.

Proposition and Authorities

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree herein questioned.

Ex parte Young, 209 U. S. 123, 155, 162;
Kennington v. *Palmer*, 255 U. S. 100;
Terrence v. *Thompson*, 253 U. S. 194, 214;
Pickard v. *Barton*, 264 U. S. 140-143.

Statement Respecting Opinions

The Court below delivered a written opinion in which the Court held that it had jurisdiction to entertain the petition

and that the allegations were sufficient to warrant the Court to make inquiry into the merits of the cause.

In refusing to grant the relief sought and to declare the statutes to be illegal, the Court used this pertinent language,

> "The respondents also objected to the Court taking jurisdiction and rendering declaratory a judgment alleging that the Plaintiffs have failed to show that they have been harmed by the seizure or forefeiture of vessels for failure to take out a license or other violations of the Statutes. It has been shown, however, that one vessel was seized but later released and that cargoes have been seized and it was admitted in argument that the State would use the forfeiture Statutes if and when the occasion occurred. We think it therefore proper for this Court to pass upon the matters involved and consider the constitutionality of the Statutes".

This reference of the Court is pointed out in connection with the contention of the defendants that they would proceed to seize the vessels under the general seizure provisions of the State which provide for hearing and due process. In refusing the contention of the plaintiffs, the Court relied upon the case of *Hendry* v. *Moore*, 318 U. S. 133. It is specifically pointed out to this Court that that case merely touched on the right of the State of California to seize minor articles on a vessel used in violation of the fishing laws and said seizure was justified because the *statutes in question* provided for a judicial determination in the Courts of California. Even in that case Mr. Justice Black objected even to the Court going this far, and pointed out, "Today it is a fish net; tomorrow it might be an ocean liner".

That the opinion of the Court on other questions in issue likewise showed erroneous construction of the prevailing laws and the underlying philosophy of said case.

In connection with the rendition of the written opinion the Court did not render any findings of fact or conclusions of

law other than those expressed in the opinion released January 23, 1950 followed by a final decree rendered January 30, 1950. Copies of the opinion and final decree are herewith reproduced as Appendices A and B and attached to this jurisdictional statement.

Respectfully submitted,

(S.) Aaron Kravitch,
(S.) Phyllis Kravitch,
(S.) Joseph Fromberg,
Attorneys for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 2362

E. B. Shipman and E. A. Shipman, Individually, and Trading as Shipman Brothers, et al., *Plaintiffs*,

v.

Andrew J. DuPre, et al., *Defendants*

Opinion

This is a suit brought by a number of persons engaged in commercial fishing. Some of these are the owners and operators of fleets of shrimp and fish trawlers off the coasts of North Carolina, South Carolina, Georgia, and Florida who are citizens and taxpayers of the State of South Carolina and are there licensed to operate. Others of the Plaintiffs are agents and employees, many of them being masters of trawlers and others being employees thereon, and they, likewise, are citizens of South Carolina. The boats engaged in fishing and trawling belonging to or employing the various Plaintiffs operate in the open sea along the Atlantic coast ranging from a one-half mile to ten miles off the coast. The Defendants are the members of the State Board of Fisheries and its Chief Inspector. They are citizens and residents of the State of South Carolina, and the said Board is created by Statutes of the State of South Carolina. (Code of Laws of South Carolina (1942) Section, 3304).

This action is brought in this Court which is alleged to have jurisdiction by reason of the contention that certain statutes of the State of South Carolina, hereinafter more fully referred to, are in violation of the Constitution of the United States and specifically in violation of the Fourteenth Amendment to the Constitution of the United States and also in violation of Article III, Section I of the Constitution which gives to the United States exclusive jurisdiction in

Admiralty, and Article I, Section 8 which gives to the United States exclusive jurisdiction over Interstate Commerce.

Plaintiffs pray for a declaratory judgment as authorized by Title 28 USCA, Sections 2201 and 2202, and for the convening of a Three-Judge Court and the granting of an interlocutory and a permanent injunction under Title 28, USCA, Sections 2281 and 2284.

Such a Three-Judge Court was convened by appropriate order and the case came on for a hearing at which time all matters involved were duly considered. Testimony was taken and all issues submitted for final adjudication.

The Complaint sets forth in detail the business in which the Plaintiffs are engaged and alleges that the Defendants acting under the authority of certain state statutes are materially and seriously interfering with the rights of Plaintiffs large losses by the seizure of their boats and cargoes and by bringing various actions against Plaintiffs and their property and employees, and constantly harassing them in the conduct of their business as a result of which the Plaintiffs have suffered, and are continuing to suffer, severe and continuous losses of large amounts of money well in excess of the jurisdictional amount of $3,000.00. The specific statutes of the State of South Carolina which are claimed to be void as in conflict with the Constitution and laws of the United States are:

Section 3403 of the Code of Laws of South Carolina of 1932. (Note 1). This Section provides for the forfeiture of vessels used, their equipment and cargoes in the tide waters of South Carolina in violation of the fisheries laws.

Section 3379 of the Code of Laws of South Carolina (1942) as amended by act of the General Assembly, June 17, 1949 (46 Statutes at Large 609, 610). The specific portions of that Act claimed to be void are those wherein it is declared that in any proceedings against a trawler, the registered master or captain shall be presumed to have been aboard the boat and such presumption shall be prima facie evidence of the same and the further portion of the Act which provides for confiscation. (Note 2).

Section 3310 of the Code of Laws of South Carolina (1942) which gives to the Board of Fisheries authority to adopt rules and regulations having the force and effect of law. (Note 3).

Section 3408 of the Code of Laws of South Carolina (1942) as amended by act of the General Assembly, April 21, 1948, 45 Statutes at Large 2058-9 wherein a closed season for the catching and dealing in shrimps is provided and all such catching, fishing, and dealing is prohibited in the closed season and boats and equipment shall be forfeited. (Note 4).

Section 3328 of the Code of Laws of South Carolina (1942) which gives authority to inspectors to examine premises, vessels and other places used in the fishing industry and to arrest without warrant persons found actually violating the laws. (Note 5).

Respondents have questioned the jurisdiction of the Court to hear this case claiming that it does not present a substantial Federal question. Title 28, USCA, Section 1331 gives the District Courts jurisdiction of all Civil actions where the matter in controversy exceeds the value of $3,000.00 exclusive of interest and costs and arising under the Constitutional Laws or Treaties of the United States. In this case, there are allegations that the amount involved is far in excess of $3,000.00. There are also distinct charges that certain acts of the General Assembly of South Carolina violate the Constitution and Laws of the United States. The Court must rely upon the allegations of the Complaint in determining whether or not the case should be heard. We think the allegations of the Complaint sufficient to warrant this Court making inquiry into the merits of the cause as set forth in the Complaint and the Court, therefore, refused motion to dismiss and proceeded to investigate and pass upon the merits of the controversy.

In addition to the statutes hereinabove referred to and set out in the notes attached, the State of South Carolina has passed a number of laws regulating the taking of fish and shrimp and other shellfish. The Plaintiffs make no complaint of the regulations covering the inland waters of the State and do not claim that their rights have been violated

or that they should be allowed to fish therein. Nor does the State claim the right to regulate this industry beyond the well recognized three-mile maritime limit; and the matters herein involved relate to fishing and trawling outside of the inland waters but within the three-mile limit of the shores of South Carolina. This Court and the Supreme Court had occasion to consider many matters relative to the right of the State of South Carolina to regulate fishing and shrimping industry. (See Toomer vs. Witsell, 73 Fed. Supp. 371; 334 U. S. 385). That case recognized that the State may exercise its police power to protect and regulate fishing rights, but that discrimination between residents and nonresidents violated Constitutional rights.

In the instant case, the Plaintiffs are not nonresidents and there is no claim of discrimination against them on such ground. Also, in this case, the Plaintiffs make no complaint as to their being required to take out licenses under the laws of South Carolina since they allege that they have conformed with the law and have obtained their licenses. The main ground of contention is the right of the State to enforce the forfeitures and penalties which the Acts impose; and the Plaintiffs main argument is against those particular statutes which provide for the forfeiture of vessels, equipment and the fish and shrimp which they have taken in instances where the statutes have been violated.

The Respondents also object to the Court taking jurisdiction and rendering declaratory a judgment alleging that the Plaintiffs have failed to show that they have been harmed by seizure or forfeiture of vessels for failure to take out a license or other violations of the Statutes. It has been shown, however, that one vessel was seized but later released and that cargoes have been seized and it was admitted in argument that the State would use the forfeiture Statutes if and when the occasion occurred. We think it therefore proper for this Court to pass upon the matters involved and consider the constitutionality of the Statutes.

Plaintiffs claim that some of the Statutes are unconstitutional because they invade the Admiralty jurisdiction given by the Constitution of the United States (Article III, Section 2) and the exclusive jurisdiction in Admiralty held

by the District Courts of the United States under the Judiciary Act of 1789 (Title 28, USCA, Section 13333). In reply to this contention, it is necessary only to cite the case of Hendry vs. Moore, 318 U. S. 133 which distinctly holds that the State may provide for a forfeiture without impinging upon such Admiralty jurisdiction.

In addition to the Statutes cited, there are penalty statutes providing for prosecution and punishment on conviction of persons violating the law in regard to the taking of shrimps and shellfish. But no question is raised here as to these matters.

But the most important and serious question is whether the forfeiture statutes hereinbefore referred to are in violation of the Constitutional protections in that they fail to provide any appropriate court process and arbitrarily deprive the Plaintiffs or others in like plight of their rights to be heard and have a judicial inquiry before their goods are taken and forfeited. There can be no question, since the decision in the Hendry case, that articles used in fishing in violation of state laws may be forfeited, provided, of course, there is due process and opportunity for appropriate court review. The dissenting opinion by Mr. Justice Black so heavily relied upon by the Plaintiffs here points out with crystal clarity the implications of the decision, and while this dissent is an eloquent and able protest against the extreme rights given to state officials, nevertheless, it underlines with startling emphasis the meaning of the majority decision. And so it would seem that our inquiry may, therefore, be limited to ascertaining whether the South Carolina Statutes give the right to decide the question of forfeiture to administrative boards without recourse to or review by any competent court. The Statutes providing the forfeitures do not set forth any procedure to be followed in forfeiture excepting that it declares that the board may pass upon such matters and give due notice if forfeiture is decided upon. But there is a statute in the Code of South Carolina (Code of Laws of South Carolina, 1942, Section 846) which is as follows:

> "Action for forfeiture of property to State.—Whenever, by the provisions of law, any property, real or per-

sonal, shall be forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the proper officer in the circuit court."

It is contended, on behalf of the petitioner, that this section was repealed because the fishing statutes (Sections 3379 and 3408; see notes) had the usual proviso that all acts or parts of acts which were inconsistent, were repealed. There is no inconsistency with Section 846 in these acts and the repealer clauses here are, of course, merely directed at prior acts affecting the regulation of fishing matters.

But under the South Carolina law, there are ample other remedies. If a boat owner or other party aggrieved is dissatisfied with the finding of the Fisheries Board and its decision to forfeit the vessel or fishing appliances, he may, in some instances, go to the Supreme Court in its original jurisdiction (Rawl vs. McCown, 97 S. C. 1) or go into the Common Pleas Courts of the State by petition for certiorari to review the findings of the board and in due course, take the case by appeal to the Supreme Court of the State of South Carolina. See Feldman vs. South Carolina Tax Commission, 203 S. C. 49. See also recent proceedings in the original jurisdiction of the South Carolina Supreme Court where application was made for writ of certiorari in the case of Pettiford vs. South Carolina State Board of Education. By Order filed October 13, 1949, the Court refused to take original jurisdiction of the matter "without prejudice to the petitioner to go into the Court of Common Pleas and seek the same relief as here sought." Later, the Plaintiff did apply to the Court of Common Pleas and that Court took jurisdiction and heard the case on the merits. See Pettiford vs. South Carolina Board of Education, Common Pleas Court of Richland County, decree filed December 13, 1949.

But in addition the foregoing, there is ample remedy allowed under the State of South Carolina Statutes and decisions. The Statutes of South Carolina give appropriate remedy by way of replevin, or as the procedure is known in this state by Claim and Delivery. The Claim and Delivery statutes will be found in South Carolina Code of Laws,

(1942) Sections 552 et seq. These provide, where one is deprived of his property, he may bring an action to recover it. This method gives ample protection if and where property has been illegally seized and is so held by any parties and will include the State Board of Fisheries, its officers or other officials making illegal seizures. The propriety of using this remedy afforded by the State has been distinctly recognized and approved by the District Court of the United States for the Western District of South Carolina in the case of Durant vs. Bennett, 54 Fed. (2nd) 634 where a Three-Judge Court sitting like this one, held that a forfeiture statute, similar to the ones here under discussion, was not unconstitutional because of lack of due process since the Claim and Delivery statutes of the State afford ample opportunity for the owners of the property to contest the seizure and forfeiture. And while it is here argued that the articles therein forfeited were inherently evil, nevertheless, that did not affect the principle involved since the question is not whether a fishing boat should be forfeited, but whether owners of such a boat are deprived of a right of court review. And if one has the right to go into court and test out the legality of a seizure of a slot machine as in Durant vs. Bennett, certainly he would have an equal right to test the legality of seizing a fishing boat by the same means and method that are distinctly open to him by reason of the Claim and Delivery Statutes.

The testimony showed that certain of the cargoes of shrimp which the inspectors claimed had been caught illegally, that is to say, within the three-mile limit during the closed season, were confiscated and sold. One of these cargoes was reported to be impregnated with an oil, apparently kerosene, and being unfit for human use, was properly destroyed. What we have said in regard to the right to forfeit vessels and equipment applies, of course, with an equal weight to the shrimp taken in violation of law. Moreover, it is questionable whether the owners of the vessels had acquired any title to the shellfish if they were taken illegally. There was no denial that these shrimp were taken within the closed season are valid, the State had a right to confiscate these cargoes.

Plaintiffs also vigorously attack the statutory regulations for a closed season. A number of witnesses testified that they saw no reason whatsoever for a closed season and stated that adjoining states did not follow this method of conservation. They admit that it was reasonable to forbid commercial fishing within the inland bays and streams which are the actual spawning grounds; but stated that the shrimp were plentiful and that commercial fishermen should be allowed, without restriction as to season, to trawl and take shrimp within the three-mile fishing grounds. They frankly admit that the shrimp are not as plentiful far out and beyond the three-mile limit; and these witnesses who complained of the fact that the inspectors had prosecuted them for fishing in the closed season said that they had fished without particular knowledge of where the three-mile limit and they stated that they had never apprehended parties unless they were clearly within this limit. And they mentioned that the particular Plaintiffs who had complained of being prosecuted were found to be fishing within a bare two to three hundred yards off the shore, the boats being so close that the inspectors, with the naked eye, could read the lettering on the boats and could describe the garb of the members of the crew.

The Plaintiffs also gave opinion evidence that there was no need of conservation by forbidding fishing during a part of the year. Yet, in somewhat contradictory language, state that this greatly hurts their business because they were forced to fish outside the three-mile limit during the closed season and the shrimping there was not nearly so plentiful. As to the best method of conservation of shrimp and whether a closed season is necessary or not is a matter of scientific research and consideration. The fishermen in this case are not in favor of a closed season. The members of the State Board of Fisheries are in favor of it and they have called our attention to considerable literature on the subject published in government and other publications concerning the shrimping industry. The State of Louisiana, which is the leading shrimp producing state of the Union, seems to have made a more extensive study into this matter than most other states, and it has a rather complete set of

statutes included in which is a season closed during a portion of the year, and government publications recommend the adoption of similar conditions throughout the area where shrimp trawling is prevalent. And so it would seem that while there may be diversity of opinion, there is very substantial and respectable authority advocating a season closed to shrimping during a part of the year in the interests of preserving the newly born small shrimp and giving them an opportunity to grow and mature.

But it is not incumbent upon this Court to pass upon the wisdom of the acts of the Legislature in determining the matter of a closed season. It is well recognized doctrine of law that the propriety and usefulness of an act of this character is one within the sound direction of the legislative body and a court will not interfere with such acts provided they are within the power of the Legislature and have some rule or basis of reason. Numerous authorities might be cited to sustain this statement, but we think it unnecessary to go beyond the case of Toomer vs. Witsell, 344 U. S. 385 heretofore referred to and in which the Supreme Court of the United States in reviewing the statutory provisions for a closed season in South Carolina said (at Page 389), "The validity of these regulations is not questioned." In the Toomer case, it was decided that the State of South Carolina had the right and power to exercise supervision over shrimp fishing in the three-mile limit. This regulation for a closed season has been in existence for many years and the creation of a closed season is a thoroughly recognized method of preserving any and all species of game and wild life. It would seem to us that the regulation is based upon common sense and reasonable grounds. However, as heretofore stated, we are not concerned with its wisdom and since it cannot be said that this is a mere arbitrary regulation, there is no reason for the Court upsetting the considered opinion of the legislative body. See Daniel vs. Family Ins. Co., 336 U. S. 220.

"But there is reason for judicial restraint in matters of policy deeper than the value of experiment; it is founded on a recognition of the gulf of difference between sustaining and nullifying legislation. This difference is theoreti-

cal in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment and not to exercise their own judgment, whether a policy is within or without "the vague contours" of due process." Concurring opinion of Mr. Justice Frankfurter in A. F. of L. vs. American Sash Co., 335 U. S. 555.

The Complaint also attacks the provisions of the statutes allowing inspection and arrest without warrant on the premises of the shrimpers. (Note 5.) This was not seriously pressed in argument and statutes giving similar rights for inspection of premises used for businesses under state supervision are so common and frequent that we do not deem it necessary to elaborate on or further discuss this point since there is no merit to it.

The Complaint also attacks the provision of the Statutes providing that the registered master or captain of a fishing boat shall be presumed to be aboard the boat. (Note 2). This contention also was not seriously pressed in argument and is a mere rule of procedure and a presumption which may be rebutted. Such provisions are frequent in regulatory statutes. It is also claimed that Section 3310 of the South Carolina Code, which gives the Board of Fisheries authority to adopt rules and regulations, (Note 3), is unConstitutional. Provisions of that kind are so prevalent in all statutory law that we do not deem it even necessary to comment on it.

Full opportunity was given to the Plaintiffs to bring out all phases and features of this case. In our opinion, they have failed to sustain their contentions that the specific statutes set forth or referred to in the Complaint and hereinabove reviewed are violative of the Constitution or Laws of the United States nor have they shown that by the acts of the Board of Fisheries or its officers or employees, the Plaintiffs have been deprived of their property or are in jeopardy of suffering such deprivation without their having full and complete opportunity for due process in appropriate courts having jurisdiction of any of the matters involved. We are, therefore, of the opinion that the prayers for declaratory judgment and issuance of an injunction

should be denied and the Complaint will be dismissed with costs allowed against Plaintiffs. Appropriate Findings of Fact, Conclusions of Law and an Order carrying into effect the foregoing views will be filed.

J. Waties Waring,
United States District Judge.

Charleston, South Carolina, January 23, 1950.

We concur:

(S.) John J. Parker,
U. S. Circuit Judge.

George Bell Timmerman,
U. S. District Judge.

A True Copy, Attest.
Ernest Adler.

Notes

Note 1: *Code of Laws of South Carolina (1932), Section 3403.*

"Forfeiture of Vessels, Etc.—Sale—Deposit of Proceeds.—Any vessel or craft, with her tackle, apparel and furniture, and any dredge, machinery, or other instrumentality used in the tide waters of this State for the taking or transporting of fish, shellfish or terrapin, in violation of the coastal fisheries law, together with the fish, shellfish or terrapin so taken shall be forfeited to the State, and in proceeding upon a hearing before the board of fisheries, may be condoned by the board of fisheries and sold by the chief inspector in the manner and after advertisement as provided for sheriff's sales or property taken under execution and the proceeds of sale, after payment of the costs and expenses of such proceedings, shall be paid into the Treasury of the State."

Note 2: *Code of Laws of South Carolina (1942) Section 3379 as amended by Act of General Assembly, June 17, 1949, 46 Statutes-at-Large 609-10.*

"* * * At the time of securing said license for said boat the owner thereof shall file with the said Board of

Fisheries a sworn statement giving the name and address of the Master or Captain of said shrimp boat. If said licensed shrimp trawler is found violating any fisheries law of this State it shall be presumed in all criminal and civil proceedings that the registered Master or Captain were in fact upon said boat, and said presumption shall be prima facie evidence of the presence of the Master or Captain upon said boat and operating same at the time of the violation of the law charged.

"In addition to the punishment provided for in Section 3407, any boat trawling for shrimp in the waters of South Carolina, without first securing a license so to do, shall be confiscated, with its rigging and equipment, to the State, and shall be sold by the State at public sale to the highest bidder for cash before the Court House door of the County in which captured, after giving ten (10) days notice of said sale in a newspaper published in said County."

Note 3: *Code of Laws of South Carolina (1942), Section 3310.*

"Board to make rules, etc.—penalties for violation.—The board shall have authority to adopt and promulgate rules and regulations for the government of the force under their control and for the control of fisheries, not contrary to or inconsistent with the laws and policy of the State, having the force and effect of law and to provide penalties for violation hereof not to exceed forfeiture of license or privilege previously granted by said board."

Note 4: *Code of Laws of South Carolina (1948) Section 3408 as amended by Act of General Assembly, April 21, 1948, 45 Statutes-at-Large 2060.*

"• • • There shall be a closed season on shrimp or prawn, beginning on the 1st day of January and ending on the 30th day of May each calendar year. Any person, firm or corporation violating said closed season shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $100.00 or more than $300.00 or by imprisonment of not less than thirty days nor more than ninety (90) days or both fine and imprisonment, in

the discretion of the court. In addition to such punishment all boats, rigging, and equipment used in any violation of said closed season shall be seized and forfeited under the provisions of Section 3403, 1932 Code."

Note 5: *Code of Laws of South Carolina (1942) Section 3328.*

"Authority of inspectors.—It shall be lawful for the inspectors to enter any and all premises, vessels, boats, houses, sheds, or warehouses used in fishing or any fishing industry in the tide waters or coastal section of this State and to arrest, without warrant, all persons found actually violating the penal laws, contained in the coastal fisheries law."

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 2362

E. B. SHIPMAN and E. A. SHIPMAN, Individually, and Trading as SHIPMAN BROTHERS, ET AL., *Plaintiffs*,

vs.

ANDREW J. DUPRE, ET AL., *Defendants*

ORDER

The Complaint in this cause alleges that certain statutes of the State of South Carolina, to-wit: Section 3403 of the Code of Laws of South Carolina of 1932; Section 3379 of the Code of Laws of South Carolina of 1942 as amended by act of the General Assembly, June 17, 1949 (46 Statutes at Large 609, 610); Section 3310 of the Code of Laws of South Carolina of 1942; Section 3408 of the Code of Laws of South Carolina of 1942 as amended by act of the General Assembly, April 21, 1948 (45 Statutes at Large

2058-59); and Section 3328 of the Code of Laws of South Carolina of 1942; are in violation of the Constitution and Laws of the United States and especially of the Fourteenth Amendment to the Constitution and Article III, Section I and Article I, Section 8. In accordance with the provisions of Title 28, USCA Sections 2201 and 2202, a court of three judges was duly convened and it was agreed and ordered that the entire matter of the prayer for injunction and declaratory judgment be heard upon the merits and a final decree entered.

This Court, having now fully heard all of the matters involved, has filed an opinion wherein appear Findings of Fact and Conclusions of Law as to all matters in issue. (Rule 52 of the Rules of Civil Procedure for the District Courts.) And for the reasons more fully therein set forth, this Court has determined that the above named Statutes of the State of South Carolina are not in contravention of the Constitution or laws of the United States as alleged and that the Plaintiffs are not entitled to the relief prayed for and that the application for declaratory judgment and injunction should be denied. Now, therefore, it is

Ordered, that the application of the Plaintiffs for declaratory judgment and injunction be and the same is hereby denied and this action is dismissed at the cost of the Plaintiffs.

Charleston, South Carolina, January 30, 1950.

(S.) JOHN J. PARKER,
United States Circuit Judge.

(S.) J. WATIES WARING,
United States District Judge for the Eastern District of South Carolina.

(S.) GEORGE BELL TIMMERMAN,
United States District Judge for the Eastern and Western Districts of South Carolina.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 689

689

E. B. SHIPMAN and E. A. SHIPMAN, Individually and Trading as SHIPMAN BROTHERS, et al,
Appellants

versus

ANDREW J. DUPRE, et al, composing the South Carolina State Board of Fisheries, a body corporate, and ALONZO B. SEABROOK, the Chief Inspector thereof,
Appellees

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

AARON KRAVITCH
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Savannah, Georgia

IN THE SUPREME COURT OF THE UNITED STATES

E. B. SHIPMAN and E. A. SHIPMAN, Individually, and Trading as SHIPMAN BROTHERS, et al,

Appellants

versus

ANDREW J. DUPRE, et al,

Appellees

Brief of Appellants Opposing Motion To Dismiss Appeal

October Term, 1950

Appellants avail themselves under Rule 7 of the Supreme Court of the United States of the privilege of answering the motion to dismiss or affirm filed by appellees.

The points raised in the motion filed by appellees can be summarized for the sake of brevity into three grounds, (a) That there are no substantial grounds for Supreme Court intervention, (b) That the statutes are constitutional, and (c) That appellants have an adequate remedy in the State Courts of South Carolina.

It should be pointed out that this is not a case in which the only questions involved are merely whether there is oppressive action either by the State or its agencies against one or two isolated individuals. If this were the only question it might be argued that this question perhaps could be adjudicated in the State Court, and appealed later to the Supreme Court for determination of the constitutionality of the statutes under review.

The record in this case shows that this is a continuation of the general scheme of oppression practiced by the State of South Carolina against fishing interests. It first was brought to the attention of this Court in the case of *Toomer vs. Witsell*, 334 U.S. 385, by present counsel, in which this Court was acquainted with the onerous restrictions placed upon non-resident fishermen. This case complains of similar practices by the State, this time in a different form and visited upon fishermen of one of the sections of the State itself.

A great deal of water has flowed over the dam since the days of *McCready vs. Virginia*, 94 U. S. page 391, and this Court in the decision rendered in *Toomer vs. Witsell*, supra, recognized the fact that the fishing business had gained national importance.

It must be kept in mind that onerous laws by one state beget onerous laws by others, and while it is true that the appellants herein are all residents of the offending state, the record shows that one fisherman, not a party to this case, was a non-resident whose boat was seized and who was unlawfully forced to part with five hundred dollars to save his vessel. Such continued acts of oppression cannot help but offend fishermen of other states and consequently invite recriminatory measures by other states as shrimping and fishing is a migratory business, and this probability was recognized by this Court in *Toomer vs. Witsell* and commented upon.

An examination of the record in the instant case shows that for more than three years, the authorities of South Carolina under unlawful and repressive statutes hounded and chased down a large lawful industry,

striking terror to the hearts of the owners and their crews, and depriving these men of thousands of dollars of revenues, and the crews of large sums of wages, and generally disrupted the industry and created such a state of confusion as to paralyze the trade in a large section of the State. Vessels were temporarily seized, large catches of shrimp summarily and unlawfully seized and confiscated, dozens of vessels unlawfully boarded and more than a score of cases made against the alleged offending owners and workmen. Not only was this practice continued but in the trial of the case before the three-judge Court, appellees stated openly their intention to seize and to confiscate boats and cargo for even the most minor violation. It is specious to say that the claim and delivery statutes of South Carolina afford appellants ample relief, and not until appellants have run the gamut of the State Courts, should they have a right to appeal to this Court. We might ask, what good would a decree of this Court do at that late date, when boats, cargo and men, in fact the entire businesses had gone? What relief or remedy in damages could be brought against a Sovereign State?

In *Toomer vs. Witsell*, supra, this same argument was presented by appellees, and answered by Mr. Chief Justice Vinson, in these strong words, "defiance would have carried with it the risk of heavy fines and long imprisonment, and withdrawal from further fishing until a test case had been taken through the South Carolina courts and perhaps to this Court would have resulted in a substantial loss of business for which no compensation could be obtained." In that case the matter of confiscation of vessels worth thousands of dollars was not actually in issue as in the instant case, as no

statute was attacked that dealt with confiscation of vessels.

Appellees argue that the only threatened result is a multiplicity of criminal violations and an impairment of private business. If this were all, it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals, it touches on the constant struggle of individuals against State to prevent this continued encroachment on the few remaining liberties left to the ordinary individual against regimentation or control. It means that from these statutes other statutes more repressive and oppressive in nature would probably be enacted and would lead to a paralysis of the fishing industry. It would mean inflation in the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. The fish industry today involves investments of millions of dollars and livelihoods of thousands of persons. Its revenues are tremendous and the impact and effect of an adverse decision would be of tremendous import to the national economy. This Court has the right with its power and prestige to step into any economic situation where the interest of thousands and perhaps millions of its citizens are vitally concerned.

It is fundamental law that Federal Courts have jurisdiction to enjoin enforcement of an unconstitutional state statute by state officers clothed with authority to enforce it, especially where it violates the Federal Constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the plaintiff, the injunction is necessary to prevent irrep-

arable injury and the case is reasonably free from doubt

Caldwell vs. Sioux Fall Stockyards Co.
242 U. S. 559

Chicago vs. Kendall
266 U. S. 94

Davis vs. Wallace
257 U. S. 478

Green vs. Louisville
244 U. S. 499

Keokuk and Hamilton Bridge Co. vs. Salm
258 U. S. 122

Pennsylvania vs. West Virginia
262 U. S. 553

Public Service Co of North Illinois vs. Corboy
250 U. S. 153

Reagan vs. Farmer's Loan & Trust Co.
154 U. S. 362

Toomer vs. Witsell, supra

Tyson & Bros. United Theater Ticket Offices vs. Banton
278 U. S. 418

Wells, Fargo & Co. vs. Taylor
254 U. S. 175, 183

Ex Parte Young
209 U. S. 123

Arrowsmith vs. Voorhies
55 F. 2d 310

Atlantic Refining Co. vs. Trumbull
43 F. 2d 154

Cotting vs. Kansas City Stockyards
79 F. 679

Elmer vs. Wallace
275 F. 86

Michigan Cent. R. Co. vs. Michigan Utilities Comm.
271 F. 319

Williams vs. McCartan
212 F. 345

Henderson vs. Thompson
12 F. Supp. 519

Joyner vs. Browning
30 F. Supp. 512

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp. 937

Cyclopedia of Federal Procedure
(2 Ed), Vol. 13 Sec. 6570, and Footnotes, pp. 130-131-132 (Callaghan & Co.) 1944

The right to go into a Federal Court for relief where a constitutional question is involved and where the amount in question is over Three Thousand ($3,000.00) Dollars is fixed by the terms of the statute itself.

"District courts have original jurisdiction in all suits of a civil nature at common law or in equity *** where the controversy exceeds *** the sum or value of $3,000.00 *** and (a) arises under the Constitution or laws of the United States ***".

Judicial Code, Section 24 amended
Title 28 USCA Sec. 41, page 32

Bell vs. Hood
327 U. S. 678

Holt vs. Indiana Mfg. Co.
176 U. S. 374

Home Tel. & Tel. Co. vs. Los Angeles
227 U. S. 228

Prentis vs. A.C.L.
211 U. S. 210

Smythe vs. Ames
169 U. S. 466

U. S. vs. Sayward
160 U. S. 493
40 L. Ed. 509

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In answer to the question that "where there is an adequate remedy in the State courts to redress a wrong, why bring the action in the Federal courts until the state remedies are exhausted?" we quote the language of Mr. Chief Justice White in the case of *Home Tel. and Tel. Co. vs. Los Angeles*, supra,

> "The enforcement of this doctrine (wait until the state courts have acted) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The cases of the *East Coast Lumber Terminal vs. Town of Babylon*, 174 F. 2d 106, *Parker vs. Los Angeles*, 94 L. Ed. (Adv.) 133 and *Alabama State Fed. of Labor vs. McAdory*, 325 U. S. 462 cited by the appellees, are inapplicable to the case at bar. In those cases the Supreme Court held that the matter would first have to be determined by the State Courts because the statutes involved were ambiguous, the meaning was not clear, and that said statutes being ambiguous should first be interpreted by a state Court to

determine if there was an issue under the United States Constitution. This principle is not new. In the present case however, the statutes under attack are not ambiguous and require no interpretation by State Courts.

The statutes under attack permit condemnation but make no provision for procedure, trial or appeal. In the case of *Matthews vs. Rodgers*, 284 U. S. 521, 76 L. Ed. 447, federal jurisdiction was denied until the case had run the gamut of the State Courts because there the statutes provided that taxes paid under protest could be recovered. Such is not true in the statutes now questioned. The so-called Section 846 and the "claim and delivery" statute which appellees are herein invoking as a delaying action are inapplicable. The authorities of South Carolina do not even profess that they will proceed under those statutes. In one instance, testimony in the record shows an allusion to a $500.00 bond being posted by a fisherman named Cesaroni whose boat had been taken. It was not until later when this proceeding was brought, that a sham case was filed against him to legalize the illegitimacy of the taking.

Under the South Carolina "claim and delivery" statute appellants would have to wait for seizure of their vessels, and to invite continued and repeated seizures and disruption of their businesses.

No provision for giving bond and keeping the vessels pending determination is provided in the statutes referred to. The action in the Cesaroni case was a "make believe" to cover up an illegal taking from a fisherman who was afraid to take a risk of the loss of a $20,000.00 boat on an adverse judicial decision when offered the

chance to deposit $500.00 with the Fisheries Commission and regain his boat.

The right to take a direct appeal to the Supreme Court from the action of a three-judge Federal Court is recognized and permitted under Title 28 USCA, Chap. 81, Sec. 1253.

See also: *Paramount Pictures vs. Langer*
306 U. S. 619
83 L. Ed. 1025

Ex Parte Young, supra

Kennington vs. Palmer
255 U. S. 100

Terrace vs. Thompson
263 U. S. 197

Packard vs. Banton
264 U. S. 140-143

Appellees contend that the proposition that South Carolina has the right to regulate fishing within the three mile limit was adjudicated in *Toomer vs. Witsell*, supra. That statement is correct, but this case does not seek to interfere with the state in the enforcement of laws that are bona fide conservation laws. The attack made here is that the record shows that the statutes are not bona fide conservation measures, and that the State has no right to adopt and enforce the measures in question within that area. It is not the place where the measures are enforced that is under attack, but the statutes providing for the enforcement.

The Court's attention is called to the fact that appellants sought in addition to an injunction a declara-

tory judgment. It is true that no boat belonging to the appellants had been seized and kept permanently, but the fact remains that the appellees were pursuing a course of conduct that placed the appellants in a position where they faced the imposition of thousands of dollars of fines and penalties, were threatened with constant seizures and their crews intimidated and terrified. Their business had been slowed to a snail's pace. The appellees openly and freely told the three-judge Court that they had just found out what powers they had and that they intended to seize boats whenever and wherever possible. In this dilemma appellants have the right to ask this Court not only for relief but for direction.

The purpose of the Federal declaratory judgment Act is to afford an additional remedy to one who is not certain of his rights and desires an early adjudication instead of waiting until his adversary should decide to bring suit,

USCA, Title 28
Chap. 151, Sec. 2201

Berlitz School vs. Donelly & Suess
84 F. Supp. 75 (1949)

In adopting the declaratory judgment act it was Congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication,

G. E. Co. vs. Refrigeration Patent Co.
65 F. Supp. 75 (1949)

The purpose of declaratory procedure is to remove uncertainty from legal relations and clarify, quiet and

stabilize them before irretrievable acts have been undertaken, and also to enable an issue of questioned status or fact on which a whole complex of rights may depend on to be expeditiously determined,

Delaney vs. Carter Oil Co.
174 F. 2d 314

A declaratory judgment if otherwise appropriate should not be dismissed merely because another remedy is available but refusal to exercise jurisdiction properly invoked must be prompted by reasons which seem to promise administration of justice.

Franklin Life Ins. Co. vs. Johnson
157 F. 2d 653

Johnson vs. Interstate Transit Lines
163 F. 2d. 125

Under declaratory judgment act courts have jurisdiction to determine validity of statutes or ordinances before a party undertakes to act in apparent violation thereof,

Skelly Oil Co. vs. Phillips Co.
174 F. 2d. 89

Wells vs. Universal Picture Co.
166 F. 2d. 690

City of Newport News vs. Elizabeth City Co.
55 S.E. 2d. 56

Dept. of Financial Institutions vs. General Finance
86 N. E. 2d. 444

Haughton vs. Lankford
52 S.E. 2d. 111

Lord vs. Garland
168 P. 2d. 5

In view of the above authorities appellants feel that this Honorable Court most assuredly has the power to grant a declaratory judgment under Title 28, Chap. 151, Sec. 2201 of the U. S. Code.

The statutes under attack seem to show a flagrant and determined design by the State of South Carolina to openly flaunt the bill of rights of the Federal Constitution. Three of the statutes set out in the record undertake to give the State the right, without any legal proceedings whatsoever, to seize, sell and confiscate the proceeds from vessels, their apparel and their cargo. The record shows that in most instances the value of each vessel runs into thousands of dollars. The violations charged are of a most minor and trivial nature.

In this connection see: *Walkerton vs. New York*
18 N. E. 2d. 799

No day in court is afforded to appellants; no remedy provided by which they can contest the verity or truth of the allegations.

Blackmer vs. U. S.
284 U. S. 420
76 L. Ed. 375

Carter vs. Kubler
320 U. S. 243
88 L. Ed. 26

Corpus Juris Secundum 37
Forfeiture Sec. 5

It is axiomatic that once equity assumes jurisdiction, it can decide all issues and this doctrine applies equally to Federal Courts of equity.

Ewing vs. St. Louis
72 U. S. 413

Gordon vs. Washington
295 U. S. 30

Smith vs. Bourbon County
127 U. S. 105

In answer to appellees' contention that the case of *Hendry vs. Moore*, 318 U.S. 133, decides the admiralty question and the legality of ship seizures without notice, etc., it is respectfully called to the attention of the Court that the Hendry case specifically dealt with a California statute which did provide for a judicial hearing, and the court upheld that procedure. Also, the article seized was a fish net and not a large vessel. Mr. Justice Black in his dissenting opinion feared that this decision might be misconstrued, and ruefully argued, "Today it is a fish net, tomorrow it might be a tramp steamer!" The fear actually came to pass in the case at bar.

The Hendry case can also be differentiated from the case at bar on the question of admiralty jurisdiction because the Hendry case involved a proceeding in rem which was within the exception to admiralty jurisdiction whereas the present statutes allow summary seizure and make no provision for a legal proceeding.

It is further contended by appellants that the statutes allowing for summary seizure and forfeiture are illegal because they provide for excessive penalties, for example allowing forfeiture of a $20,000.00 vessel for fishing without a $25.00 license, and because the statutes provide for no legal procedure, notice or hearing, in conflict with the due process clause of the United States Constitution.

U. S. Constitution, Art. XIV

Blackmer vs. U. S., supra

Palko vs. State of Connecticut
302 U. S. 319
82 L. Ed. 288 (1937)

Scott vs. McNeal
154 U. S. 34
38 L. Ed. 896

Waters-Pierce Co. vs. State of Texas
212 U. S. 86
53 L. Ed. 417

Swanson vs. Bates
170 F. 2d. 648 (1949)

Mirkovich vs. Milnor
34 F. Supp. 409 (1940)

Finance Sec. Co. vs. Conway
146 So. 22
176 La. 456

Frahn vs. Greyling Realization Co.
195 So. 758
239 Ala. 580 (1940)

Pa. R. R. Co. vs. Driscol
198 A. 130
330 Pa. 97

Santos vs. Dondero
54 P. 2d. 764

Corpus Juris Secundum 37
Forfeiture Sec. 5

In support of their contention that summary seizure and forfeiture of fishing vessels without a legal procedure, notice, hearing nor opportunity to defend, is not a violation of the due process clause, appellees cite

Durant vs. Bennett, 54 F. 2d. 634. This case involved a gambling device, however, and it is acknowledged that the exception to the general rule forbidding summary forfeiture without a hearing is the right of a state to destroy an article of itself dangerous or inimical to the public health, welfare or morals. A fishing vessel does not belong in this category.

There is another exception where the property taken is of little value.

Lawton vs. Steele
152 U. S. 134
38 L. Ed. 385

Appellees deny that the statutes questioned provide for a taking of property without due process of law and point to Section 846 of the 1942 South Carolina statutes and the "claim and delivery" statute to support their position. We contend that Section 846 providing "Whenever by the provision of law any property real or personal shall be forfeited to the State or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, *may* be brought by the proper officer in the Circuit Court," was repealed by Section 3379 of the Acts of 1949 providing for forfeiture of vessels without a hearing, which Act states "All acts or parts of act inconsistent with the provisions of this act are hereby repealed." However, even if this definite language should be construed as not repealing Section 846 insofar as forfeitures are concerned, Section 846 has not been followed by the South Carolina authorities in the cases where they have confiscated shrimp and forfeited vessels and furthermore, the language of Section 846 "An action *** *may* be brought by the proper officer ***"

is not mandatory upon the State officers but is merely optional. We have already commented in this brief on the fallacy of assuming that the appellants have an adequate remedy under the "claim and delivery" statute.

One of the statutes under attack, Section 3328, specifically permits the searching of boats, etc., without a warrant, and the arrest without a warrant of any person found thereon violating the law. This is the boldest enunciation of the "rule of force" ever adopted by a state. This court has struggled with the question of reasonable and unreasonable searches on the part of officers for years. Recently this Court was divided in *U. S. vs. Rabinowitz,* (Feb. 20, 1950) on the question of when a search was reasonable and when it was not. In that case a warrant to arrest preceded the search. The State of South Carolina has taken refuge in the action of this Court in applying the 4th amendment only as against Federal officers. This cautious position may have been right years ago but with constitutional rights being flaunted by states under this distinction, we submit that the time has come for this court to hold that a person and his home can be invaded just as illegally by a state officer as by a federal officer, and certainly set aside unconstitutional state statutes. The trend of the Supreme Court has been to broaden the scope of its scrutiny of tyrannical acts.

This court now makes no distinction where confessions are exacted through force or pressure by either state or Federal officers. Is there any logical reason why the brutal act of an officer in forcing a defendant to make a confession is frowned on, *Ashcraft vs. Tenn.*, 322 U. S. 143, *White vs. Texas,* 310 U. S. 530, but a

more brutal act of knocking down one's door, invading his house or business, ransacking his possessions, and seizing evidence is winked at. We submit that this court is never bound by precedent, and that when public policy demands, it is free to enunciate a principle in keeping with the times. We submit the time has come. Today it is fishermen. Tomorrow it could be the President.

The precise question which we are raising in this case has never been, as far as we can find, ruled on by this Court. Heretofore this Court has ruled that it would not interfere with rules of evidence by state tribunals.

The case of *Wolfe vs. Colorado*, 93 L. Ed. (Adv.) 1356, cited by appellees, thus differs from the present case, for in that case and in many of the other cases upholding the ruling of State Courts that evidence illegally obtained could be admitted in evidence, the courts were dealing with a rule of evidence. Here we have a statute which specifically allows for the unlawful search and seizure without a warrant and for the unlawful arrest of a person without a warrant. We wish to call to the attention of the Court that provision of the 14th Amendment which we believe applies to a matter of this kind, to-wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In conclusion, the case of *Hynes vs. Grimes Packing Co.*, 93 L. Ed. (Adv.) 964, cited by appellees, can be used by appellants to support their position that the Federal Courts have jurisdiction, since in that case the

facts and the hazard to be encountered were practically the same as the present case. Mr. Justice Reed who delivered the majority opinion for the Court used this expression, "It is not a threat of a single prosecution *** under the findings the respondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. In the pursuit of their otherwise lawful business, respondents are threatened with criminal prosecution *** for the violation *** severe penalties are imposed including fine, imprisonment, the summary seizure of boats *** In such a situation a majority of the Court thinks that the "danger of irreparable loss is both great and immediate" and properly call forth the jurisdiction of the Court of Equity."

The argument advanced by appellees that the Federal Courts are without jurisdiction, that the damage is not irreparable, etc. and that the petition be dismissed were presented to the three-judge Court, and from their ruling that they had jurisdiction, no exceptions were taken by appellees.

Since this case will be more fully presented when reached on its merits, we deemed it unnecessary to amplify the assignments of error or present more authorities at this time. The trial court granted the appeal in this case. That action alone signified, that unlike distinguished counsel for appellees, they felt that it was a case that called for review by this Honorable Court.

We submit that this court has jurisdiction to entertain the appeal, that the matter is one of national im-

portance, and calls for a determination of the case on its merits.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 689

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,
Appellants,

vs.

ANDREW J. DuPRE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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T. C. CALLISON,
Assistant Attorney General of South Carolina;
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SUPREME COURT OF THE UNITED STATES

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No. 689

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,

Appellants,

vs.

ANDREW J. DuPRE, ET AL.,

Appellees

MOTION TO DISMISS OR AFFIRM

Pursuant to the provisions of Rules 7 and 12 of the Supreme Court of the United States, the appellees move the Court to dismiss the appeal or in the alternative to affirm the judgment of the Court below upon the following grounds:

1. That the questions on which the decision of the cause depends are so unsubstantial as not to require further argument because:

(a) All Federal questions raised have been definitively answered by prior decisions of this Court;

(b) The State of South Carolina has jurisdiction to regulate fishing within its coastal waters within the three (3) mile maritime belt;

(c) The admiralty jurisdiction of the Federal Courts does not prevent South Carolina enforcing its own commercial fishing laws in its State Courts against its own residents;

(d) The appellants have failed to show that the statutes attacked are other than proper conservation measures.

2. That appellants have no proper standing in a Federal Court of Equity to justify the relief sought because:

(a) No boat belonging to appellants has been confiscated by the State under the confiscation provisions which are attacked, and when and if such confiscation is made an adequate remedy is available to the appellants in the Courts of South Carolina, which Courts should be permitted to pass initially upon the questions raised.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General of South Carolina;
T. C. CALLISON,
Assistant Attorney General;
R. HOKE ROBINSON,
Assistant Attorney General,
Attorneys for Appellees,
Andrew J. DuPre, et al.

Columbia, S. C.,

February 25, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 689

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,

Appellants,

vs.

ANDREW J. DuPRE, ET AL.,

Appellees

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

The appellants, resident commercial fishermen of South Carolina, sought an interlocutory and permanent injunction before a Three Judge District Court, convened pursuant to Section 266 of the Judicial Code as revised in New Title 28, U. S. Code, Section 2284, against the enforcement by the appellees, who constitute the State Board of Fisheries, of certain "fisheries laws" of South Carolina. Appellants are represented by the same able counsel who brought the case of *Toomer* v. *Witsell*, 334 U. S. 385, in which case this Court upheld South Carolina's right to regulate fishing within the three (3) mile maritime belt and to impose a tax on shrimp

caught by non-resident fishermen in South Carolina waters, but invalidated as discriminatory the law which required a license from non-resident fishermen one hundred (100) times greater than that required from resident fishermen, and as an undue burden on commerce the law requiring shrimp caught by a non-resident fisherman to be brought into South Carolina ports, unloaded, weighed, and stamped.

The plaintiffs in the *Toomer* case were all nonresident Georgia fishermen. In the present case the appellants are all resident South Carolina fishermen who make a broadside attack upon South Carolina fisheries laws enacted since the Toomer decision and also attack several of the laws in existence at the time of the Toomer decision, some of which were specifically upheld in that case. They attack the validity of the closed season and of that portion of the closed season law empowering the State officers to seize and confiscate boats for violating the closed season law, alleging that these laws violate the due process clause. They also contend that the enforcement of the confiscation provisions is a matter within the exclusive admiralty jurisdiction of Federal Courts and not enforceable in the State Courts. They further contend that South Carolina has no jurisdiction to regulate fishing within the three (3) mile belt and that the statute creating a presumption that the master is on board when a vessel is charged with violating the fishing laws is unconstitutional under the due process clause.

At the hearing before the Three Judge Court a final decree was issued on January 30, 1950, dismissing the action and denying the application for a declaratory judgment and an injunction. The Court held that the plaintiffs had shown threatened irreparable damage sufficient to justify a Federal Court of Equity in assuming jurisdiction, but on the merits held the South Carolina statutes valid. It was held

that the provisions for forfeiture did not impinge upon the admiralty jurisdiction of Federal Courts.

It is the appellees' position that the constitutional questions raised by appellants are so unsubstantial as not to require argument and that as to the forfeiture provisions, concerning which appellants devoted most of their argument in the Court below, they have an adequate remedy at law in the Courts of South Carolina if and when South Carolina seeks to enforce these provisions against the appellants or any of them. Authorities supporting these positions are cited below.

I

Appellants' constitutional questions are without substance, having been settled by decisions of this Court.

A. South Carolina has jurisdiction to regulate the fisheries within its territorial limits including the three (3) mile maritime belt. *Toomer* v. *Witsell*, 334 U. S. 385; *Skiriotes* v. *Florida*, 313 U. S. 69; *McCready* v. *Virginia*, 94 U. S. 391.

B. *The Closed Season.* South Carolina has had a closed season on shrimping in the marginal seas since 1925. Acts of 1925, page 225; Code of 1932, Section 3408; Code of 1942, Section 3408. The closed season extends from January through May of each year. Acts of 1948, page 2058. The appellants failed utterly to sustain the burden of proving that the closed season is so unreasonable and arbitrary as to have no relation to the police and conservation powers of the State over its natural resources. Whether the challenged act is wise or unwise is for the Legislature, not for the Courts. *Daniel* v. *Family Security Life Insurance Company* 93 L. Ed. (adv.) 483. In the *Toomer* case, *supra*, at which time the closed season consisted of four (4) months, from March through June, the Court stated that the validity

of the closed season was not questioned. 334 U. S. 389. See *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 30; *Hynes* v. *Grimes Packing Company*, 93 L. Ed. (adv.) 964.

C. The argument that the enforcement of the challenged South Carolina laws rests exclusively in the admiralty jurisdiction of Federal Courts is conclusively answered, as the Court below pointed out, by the case of *Hendry* v. *Moore*, 318 U. S. 133. In the oral argument below appellants did not even mention this point.

D. The South Carolina license fee on shrimp boats, imposed at the rate of One Dollar ($1.00) per foot keel measure, is reasonable. *Toomer* v. *Witsell*, 334 U. S. at 399.

E. The attack upon the South Carolina law permitting inspectors of the Fisheries Board to enter upon vessels and arrest without warrant persons found violating the fishing laws has no merit from the constitutional viewpoint. The search and seizure provisions of the Fourth Amendment are not a part of that due process required of the States by the Fourteenth Amendment, and South Carolina is among those States which permit the use in Court of evidence secured through illegal searches and seizures. *Wolf* v. *Colorado*, 93 L. Ed. 1356, 1361.

F. Appellants also attack the provision that the registered master or captain of the fishing boat shall be presumed to be aboard the boat when such boat is found violating any of the fisheries laws. This is a mere rule of procedure and a presumption which may be rebutted by evidence. Such provisions are frequently found in regulatory statutes.

The forfeiture provisions will be discussed in Section II *infra* of this Brief.

II

The forfeiture provisions are valid and appellants have an adequate remedy at law to test their validity.

In 1948 South Carolina amended Section 3408 of the Code, which section is concerned with the closed season for commercial shrimp fishing, to include a provision that the State authorities were authorized to confiscate boats, equipment, and rigging for violation of the closed season provisions and that such confiscation would be in accordance with the provisions of Section 3403 of the 1932 Code of Laws of South Carolina. In 1949 the State amended Section 3379, which is concerned with the licensing of shrimp boats, to include a provision that boats found shrimping without the required license could be confiscated.

The validity of the confiscation provisions of Section 3379 is not before the Court in the instant case because it is admitted that the required license has been obtained for each boat belonging to the appellants, and no seizure or threat of seizure for failure to obtain a license has been shown.

It is our position that the validity of the seizure provisions of Section 3408 is also not properly before the Court, because it is admitted that no boat of the appellants has been confiscated or sought to be confiscated under the closed season statute. We contend that when and if such a seizure is made the appellants have a plain and adequate remedy by claim and delivery or by writ of certiorari to test in the State Courts the validity of the forfeiture.

Assuming, however, for the sake of argument that the threat of seizure is sufficient to confer jurisdiction on the Federal Court of Equity, the appellants have failed to show any lack of due process in the seizure provisions of the closed season law. Section 3403 of the 1932 Code, which

Section is incorporated by reference into Section 3408 as amended provides for a proceeding upon a hearing before the Board of Fisheries, and that the vessel, etc., may be condemned and sold after advertisement as provided for Sheriff's sales. Since no actual forfeiture is before the Court in the instant case, the Court must presume in passing upon the validity of the forfeiture provisions that those provisions will be so interpreted and administered by the officer or administrative body charged therewith as to render valid their application. *Bourjois, Inc.* v. *Chapman, Inc.*, 301 U. S. 183; 16 C. J. S., Constitutional Law, Section 100.

The provisions for advertisement before sale gives the condemnee the opportunity, if he desires, to protect himself by bringing claim and delivery proceedings or by seeking review of the board action in the State Courts by writ of certiorari. *Jones* v. *State Board of Fisheries*, 161 S. C. 309, 159 S. E. 651; *Feldman* v. *South Carolina Tax Commission*, 203 S. C. 49, 26 S. E. (2d) 22; *Durant* v. *Bennett*, 54 F (2d) 634.

In addition to the procedure provided in Section 3408 as amended, South Carolina has a general provision relating to forfeiture set out in Section 846 of the 1942 Code which provides that whenever, by the provisions of law, any property is forfeited to the State, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the proper officer in the Circuit Court. Whether the State in seeking to forfeit a shrimp boat would proceed under Section 3408 as amended or under the general forfeiture provision in Section 846 is not clear, since no actual test of the forfeiture provision has been made, and in the one case where the boat of a Georgia fisherman not a party to this action was seized for fishing without a license, it was shown that the owner posted Five Hundred

Dollars ($500.00) bond, which with his consent was forfeited to the State, and the boat returned to him.

This Court will not decide constitutional questions ahead of the necessity therefor, *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 462; and where the question is one of state procedural due process which presents no fact situation and which has not been tested in the State Courts it is especially appropriate for the Federal Courts to remit the matter to the State Courts for an interpretation of the State procedure. *East Coast Lumber Terminal* v. *Town of Babylon*, 2d Cir., 1949, 174 F. (2d) 106. Cf. *Parker* v. *Los Angeles*, 94 L. Ed. (adv.) 133.

Conclusion

It is submitted that the constitutional questions raised by the appellants are unsubstantial, that appellants have no standing in a Federal Court of Equity to enjoin enforcement of these State criminal laws and that the Court should dismiss the Appeal or affirm the action of the Court below.

Respectfully submitted,

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